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# MICHIGAN LAW REVIEW

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## ADMINISTRATIVE LEGISLATION.<sup>1</sup>

**F**EW people are aware of the great extent to which public administration in the United States national government is controlled by means of administrative regulations or orders, in the nature of subordinate legislation. Most writers on American government have emphasized the greater detail of statutory legislation in this country as compared with the statutes of continental countries in Europe, or even with Acts of Parliament in Great Britain, and have under-estimated, and indeed have usually ignored entirely, the enormous mass of administrative legislation supplementing Acts of Congress, and issued by the President and the various executive departments, bureaus, commissions and other agencies of the national administration.

It is, of course, true that administrative regulations in the United States are, on the whole, of comparatively less importance than Orders in Council and departmental regulations in Great Britain; and relatively still less important than have been the administrative ordinances of the German Bundesrath, or the decrees issued in the name of the President of the Republic of France, and similar regulations in other European countries. But the volume and importance of such administrative regulations in the national administration of the United States are, nevertheless, deserving of much more attention than they have hitherto received.

In state government such administrative regulations are also becoming of some importance, though still much less than in the national government.

Important as such executive regulations have been, even in time of peace, they are of much greater importance in time of war; and during the recent emergency regulations of this kind have been

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<sup>1</sup> By Professor John A. Fairlie, Chief of the Orders and Regulations Section in the Purchase, Storage, and Traffic Division of the General Staff, U. S. A., 1918-19.

brought to the attention of many outside the circle of government officials.

The present article presents a general view of the field covered, and notes the principal judicial decisions relating to such regulations.

Perhaps the earliest recognition of the general significance of this field of governmental action, is in a pamphlet entitled "Remarks on Army Regulations," by G. Norman Lieber, Judge Advocate General of the Army, which was originally printed in 1897. In this pamphlet General Lieber stated:

"It is difficult to form a true conception of the vastness and importance of all this great body of executive regulation law, controlling, as it does, the administration of all the executive departments with its rules of action. And when we consider that these rules of action are in general made, construed, and applied by the same authority, thus combining quasi-legislative, quasi-judicial and executive authority, we cannot fail to be very much impressed with the extent of jurisdiction covered by them."<sup>2</sup>

There are indeed, besides presidential proclamations and executive orders, many elaborate systems of executive regulations governing the transaction of business in each of the executive departments and in the various services both within and without these departments. These include organized codes of regulations for the army, the navy, the postal service, the consular service, the customs service, the internal revenue service, the coast guard, the patent office, the pension office, the land office, the Indian service, the steamboat inspection service, the immigration and the naturalization bureaus, and the civil service rules. In addition to long established types of regulations, there have been many new series of regulations issued in recent years both before the war, and more recently by the new war agencies, such as the Food and Fuel Administrations, the War Industries Board, and the War Trade Board.

A recent volume on *Federal Rules and Regulations*,<sup>3</sup> republishing regulations promulgated within the past few years gives some indication of new fields of administrative regulation by the United States national government. A large part of this volume includes regulations issued by the Department of Agriculture, with some from other departments and agencies. But these form only a small part of the total mass of such regulations.

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<sup>2</sup> G. N. LIEBER, REMARKS ON ARMY REGULATIONS (1898), p. 47.

I. A. LAPP: FEDERAL RULES AND REGULATIONS (1918).

In addition to the systematized and codified regulations, there is perhaps an even more extensive body of more specialized rules, orders, and instructions issued by the various departments, bureaus, commissions, and local agents, knowledge of which is often limited to the persons who have to apply them and to those whom they affect.

#### TYPES OF REGULATIONS.

Some general considerations as to the character of such executive regulations, may now be noted. Most regulations are issued to supplement statutes, in many cases under express provisions in the statutes, and in other cases as an implied power of interpretation or application. But there are also important regulations issued as an exercise of the constitutional executive power of the President.

Thus the army and navy regulations were for a long time issued by virtue of the President's constitutional authority as commander in chief of the army and navy. In other cases the President has issued proclamations and executive orders without reference to any statute or congressional authorization, as in some instances of reservations of public lands.

Regulations issued in accordance with statutory provisions are much more common. Thus the President is now specifically authorized to make regulations for the government of the army and the marine corps, and the purchase and disposition of supplies for the army and navy, in relation to the duties of the diplomatic and consular service, and for admission to the civil service. He may issue regulations as to the treatment of alien enemies in time of war, rules for the operation of the Panama Canal, and regulations relating to Indian affairs. He is authorized to provide the uniforms for the army, and he has explicit power to establish internal revenue districts, pension agencies, and forest reservations.<sup>4</sup> Under some tariff acts he has been authorized to suspend tariff duties on imports from countries which entered into reciprocity agreements with the United States. Under the tariff act of 1890, he was even authorized to suspend certain clauses of the act permitting the importation of certain commodities free of duty, with reference to goods imported from countries which imposed duties on American products deemed by the President to be reciprocally unequal and unreasonable. By this provision, the imposition of duties was made to depend on the action of the President; and this grant of power

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<sup>4</sup> REV. STAT., §§ 465, 1296, 1549, 1752, 1753, 3141, 4035, 4067, 4778, 4780; 26 STAT. AT L. c. 561, Acts of 1891, p. 1095; 37 STAT. AT L., c. 390, p. 560. Act of Aug. 24, 1912.

to the President was upheld by the Supreme Court, in the case of *Field v. Clark*.<sup>5</sup>

The war legislation of the past two years made further extensive grants of power to issue administrative regulations and orders. The Selective Service Act authorized the President to make regulations relating to the draft, the time of registration, and the organization and procedure of local boards. The Food and Fuel Act of 1917 vested the President with sweeping powers of control over food and fuel supplies; and further authorized him to exercise this power through such agency or agencies as he might establish. Under the Overman Act of 1918, the President was given a still more extensive power to change and alter the administrative agencies established by statute, so as to secure more effective co-ordination of effort during the emergency of the war.

Heads of the executive departments are also definitely authorized by statute to issue administrative regulations; and most executive regulations are in fact issued in the name of a department, bureau or commission rather than that of the President. The revised statutes contain a general provision authorizing the head of each department: "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."<sup>6</sup> It is also the duty of the heads of the several executive departments to make appropriate rules to secure a proper administrative examination of accounts; and they are empowered to make regulations relating to property returns.<sup>7</sup> In addition, more specific ordinance powers have been granted to the heads of particular departments; and also to chiefs of bureaus, commissions and other administrative agencies.

The Secretary of the Treasury, under the Revised Statutes, is authorized and required to make and issue regulations for officers, depositaries and others who may receive United States notes or other securities of the United States; and to prescribe regulations for enforcing the customs and internal revenue laws. More specifically statutory provision is made for customs regulations as to appraisals, bonded warehouses, drawbacks and refunding duties, and for the recognition of agents and attorneys representing claimants before the department. The Secretary of the Treasury is further authorized to make quarantine rules and regulations to prevent the intro-

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<sup>5</sup> 143 U. S. 649.

<sup>6</sup> REV. STAT., § 161; *cf. ibid.*, 2652.

<sup>7</sup> 28 STAT. AT L., C. 49, 174, p. 47, 163, Acts of March 29 and July 31, 1894.

duction of contagious and infectious diseases; and also to make regulations for the life saving service and governing enlistments in the revenue cutter service,—now included in the coast guard.<sup>8</sup>

Authority to establish regulations under the internal revenue laws is also given to the commissioner of internal revenue, with the approval of the Secretary of the Treasury. This authority has been provided with reference to suits under the internal revenue laws. It has also been extended to the control of various articles subjected to taxation for purpose of regulation or suppression,—as the manufacture of butter or oleomargarine, filled cheese and mixed flour, for bottling spirits, for white phosphorus matches, and for trade in opium, cocaine and other narcotics. Regulations are further authorized by the war revenue acts.

The bureau of war risk insurance has power, with the approval of the Secretary of the Treasury, to make any and all regulations necessary for carrying out the purpose of the act.

Army Regulations were for many years based on the constitutional powers of the President; but there are now statutory provisions authorizing the President to make and publish regulations for the army in accordance with existing law. In practice, however, while general revisions of army regulations have been issued by authority of the President, changes made from time to time, and also general orders and other instructions, are regularly issued "by order of the Secretary of War." Important orders and instructions are also issued by chiefs of bureaus and other officials. The Secretary of War is specifically authorized to prescribe rules and regulations to be observed in the preparation and submission of bids for contracts under the War Department. He also establishes rules governing the use of navigable waters.<sup>9</sup>

In contrast with Army Regulations, the issue of regulations for the navy by the Secretary of the Navy, with the approval of the President, has been definitely recognized by Congress. The methods in actual use in the two departments are, however, substantially the same.<sup>10</sup>

Under authority of a statutory provision making it the duty of the Postmaster General "to instruct all persons in the postal serv-

<sup>8</sup> REV. STAT., §§ 251, 1875, 2949, 2989, 3057, 3107; 18 STAT. AT L., C. 344, p. 727, Act of June 20, 1874; 23 STAT. AT L., C. 334, p. 236, Act of July 7, 1884; 34 STAT. 209, Act of May 20, 1906, C. 2556; 27 STAT. 449, Act of Feb. 15, 1893, C. 1151. 3.

<sup>9</sup> Act of March 1, 1875, C. 115, 18 STAT. 337; Act of April 10, 1878, amended by Act of March 3, 1883, C. 120, 20 STAT. 36, 22 STAT. 487. The army regulations of 1881 were issued under specific authorization from Congress, Army Appr. Act of June 23, 1879, C. 35, § 2, 21 STAT. 34.

<sup>10</sup> REV. STAT., § 1547, Act of July 14, 1862, C. 164; § 5, 12 STAT. 565.

ice with reference to their duties," the Postmaster General promulgates a series of Postal Regulations, which have been judicially recognized.<sup>11</sup> More specifically it is provided that the purchasing agent for the Post Office Department "shall, under such regulations not inconsistent with existing laws as the Postmaster General shall prescribe, and subject to his direction and control, have supervision of the purchase of all supplies for the postal service."<sup>12</sup>

The Secretary of the Interior is authorized to prescribe rules and regulations governing the recognition of agents, attorneys or other persons representing claimants before his department; and some more specific provisions are made in reference to the work of the land office. The commissioner of patents, subject to the approval of the Secretary of the Interior, may prescribe regulations, not inconsistent with law, for the conduct of proceedings in the patent office. The bureau of mines may issue regulations under the explosives act.<sup>13</sup>

Numerous statutes authorize the Secretary of Agriculture to make rules and regulations on many subjects,—including the importation and interstate movement of animals and plants; the fixing of standards for grain, lime barrels and fruit baskets; the protection of forest reservations, and migrating birds; and the execution of Acts of Congress relating to meat inspection, cotton futures, and federal aid for good roads. These powers are of special importance as affecting, not only those in the public service or those voluntarily appearing before public officials, but also imposing regulations on private individuals.<sup>14</sup>

In the Department of Commerce, the Secretary is required to make regulations relating to the work of the bureau of standards; and the supervising inspectors of the steamboat inspection service are authorized to make rules, with the approval of the Secretary.<sup>15</sup>

In the Department of Labor, the Secretary is authorized to prescribe regulations under the Chinese Exclusion Act and in relation to the admission of children; and the commissioner general of im-

<sup>11</sup> *United States v. Warfield*, 170 Fed. 43, (C. C. A., 4th C., 1909; *Bruce v. United States* (C. C. A., 8th C., 1912), 202 Fed. 98; *Carr v. Jeffersonville First National Bank*, 35 Ind. App. 216, 73 N. E. 947, (1905).

<sup>12</sup> Act of April 28, 1904, C. 1759, § 3—33 STAT. 440.

<sup>13</sup> Rev. STAT., § 483; Act of July 4, 1884, C. 181, § 5; Act of March 2, 1895, C. 177, § 3; Act of April 19, 1904, C. 1398; Act of October 6, 1917, § 18.

<sup>14</sup> Inspection of Meats Acts, Aug. 30, 1890, June 30, 1906, March 4, 1907, Oct. 3, 1917; Bureau of Animal Industry Act, May 29, 1884; Plant Quarantine Act, Aug. 20, 1912; Grain Standards Act, Aug. 11, 1916; Agricultural Appr. Act, June 30, 1914; Federal Good Roads Act, July 11, 1916; Cotton Futures Act, Aug. 11, 1916; Tariff Act, Oct. 3, 1913.

<sup>15</sup> Act of March 3, 1901, C. 872, § 9—36 STAT. 1450; Act of June 7, 1897—30 STAT. 102, amended by Act of May 25, 1914—38 STAT. 38.

migration is required to establish rules and regulations relating to immigration, with specific provisions as to certain matters. Rules and regulations are also issued in relation to naturalization.<sup>16</sup>

In some cases the power to establish administrative regulation has been vested jointly in the heads or other representatives of several departments. Under an Act of 1902, the surgeon general of the army, the surgeon general of the navy and the supervising surgeon general of the marine hospital service were constituted a board with authority, subject to the approval of the Secretary of the Treasury, to promulgate rules to govern the issue, supervision and revocation of licenses for establishments for the propagation of viruses, toxins, antitoxins and analogous products.

The Food and Drugs Act of 1906 provided that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of the Act. The Insecticide Act of 1910 contained a similar provision; and the Seed Importation Act of 1912 provided that the Secretary of the Treasury and the Secretary of Agriculture shall, jointly or severally, make such rules and regulations as will prevent the importation of seeds adulterated or unfit for seeding. The Naval Appropriation Act of 1916 authorized regulations relating to the lighthouse service in time of war to be made by the Secretary of the Navy, the Secretary of War and the Secretary of Commerce.<sup>17</sup>

Various boards and commissions outside of the executive departments have also power to prescribe administrative regulations. The Interstate Commerce Commission is authorized to make general rules or orders for the regulation of proceedings before it; and has also been authorized to establish safety appliance standards, and regulations for medals of honor.<sup>18</sup> Rules and regulations are also authorized to be made by the Federal Trade Commission, the Federal Reserve Board, the Farm Loan Board, the United States Shipping Board and the Copyright Office in the Library of Congress.

Regulations issued by the heads of departments are considered as the acts of the President; and such regulations are frequently

<sup>16</sup> Act of Sept. 13, 1888, C. 2015, § 8—25 STAT. 476; Act of April 29, 1902, C. 641, § 2—32 STAT. 591; Act of Feb. 20, 1907, C. 1134, § 22—34 STAT. 905; Act of Feb. 5, 1917,

<sup>17</sup> Act of July 1, 1902, C. 1378, § 4—32 STAT. 729; Act of June 30, 1906, C. 3915, § 3—34 STAT. 768; Act of April 26, 1910, C. 191, § 3—36 STAT. 331; Act of Aug. 24, 1912, C. 381, § 1—37 STAT. 506; Act of Aug. 29, 1916, C. 417, §—39 STAT. 602.

<sup>18</sup> Act of Feb. 4, 1887, C. 104—24 STAT. 379, 384; Act of March 3, 1893, amended April 14, 1910; Act of Feb. 23, 1905. It was also authorized to establish regulations under the Child Labor Act of 1916, which has been held unconstitutional.

promulgated under statutory provisions authorizing the President to act. The Supreme Court has held that,

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. . . . We consider the act of the war department in requiring the reservation to be made, as being in legal contemplation the act of the President."<sup>19</sup>

Similarly it has been held that,

"Postmasters . . . are instructed with reference to their duties through the First Assistant Postmaster General; for the Postmaster General does not personally perform all the duties imposed upon him by statute."<sup>20</sup>

No definite ruling appears to have been made as to how far this principle of action through agents may legally be carried. Most regulations are in fact prepared by subordinate officers in the several departments, although issued in the name of the head of the department, or even in the name of the President. In some cases, too, at least during the war, orders and regulations have been issued by subordinate officials, acting by authority of the head of the department, in matters where the statutes vested the power in the President. The question arises, if the Postmaster-General can act for the President, and if the First Assistant Postmaster-General can act for the Postmaster-General, can the First Assistant Postmaster-General, or perhaps an inferior officer, be authorized by his superior to exercise powers (such as those in the Overman Act) which Congress has provided shall be exercised by the President?

In addition to regulations covered by express authorizations, other regulations supplementing statutes are also issued. Such regulations are often in the nature of interpretations of statutes, or prescribe means for carrying them into effect in the absence of sufficiently explicit statutory provisions. Perhaps the most important example of such regulations were those for the revenue cutter service (now included in the coast guard), which established a code of penalties and a system of disciplinary procedure, similar to that in the army and navy, based on executive action alone.

#### JUDICIAL RULINGS.

A definite line of demarcation between administrative regulations and the provisions of statutory legislation is not easy to draw.

<sup>19</sup> *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, 513 (1839); Cf. *United States v. Eliason*, 16 Pet. (U. S.) 291 (1842).

<sup>20</sup> *United States v. Warfield* (C. C. A., 4th C., 1909), 170 Fed. 43.

Indeed cases can be cited where analogous, and almost identical, rules are to be found both in the form of statutory provisions and in administrative regulations. Thus the customs collections districts were for many years established by acts of Congress; while internal revenue districts were subject to change by executive regulation. Even more striking are the provisions of the Overman Act, under which it is stated that the President may, by executive act, alter temporarily, the provisions of acts of Congress establishing and organizing the administrative agencies of the national government.

Such instances give point to the questions which have arisen as to whether administrative regulations are not substantially legislation, and so beyond the power of the executive (except in the case of constitutional authority), and beyond the power of Congress to delegate. On these questions the United States courts have held that Congress may authorize executive and administrative officers to make rules and regulations, and also that this does not constitute a delegation of legislative power.

In strict logic these opinions are hardly consistent with each other. Congress possesses only legislative power; and any grant of power by Congress would seem to be necessarily a delegation of legislative power. Under a strict construction of the constitutional provisions, it would appear that statutory provisions authorizing executive regulations must either be considered a delegation of legislative power (which the courts have held cannot be delegated), or they are not grants of power, but declaratory provisions that the matters left for executive regulation are not legislative in character.

The practical considerations which have led to the provisions for administrative regulations are that it has proved impossible to cover all matters of detailed regulation by statute; and that as the volume of governmental action has increased a larger proportion of the detailed rules have necessarily been left to executive authorities. The line of distinction is not, and probably cannot be made, exact. Whatever the logical difficulties, the fact remains that there is a broad twilight zone between the field of what is distinctly and exclusively legislative and what is necessarily executive in character; that courts have recognized that matters within this "no man's land" may be at times included in statutory legislation, and at other times may be expressly authorized by statute for administrative action; and if neither of these steps is taken such action has been, under some circumstances, assumed as an inherent executive or administrative power.

It is clear at any rate, that both Congress and the United States courts are disposed to recognize a broad field for administrative regulations, whether specifically authorized by statute, or as an exercise of constitutional power. Army regulations issued by the President as commander-in-chief have been repeatedly recognized as valid, in the face of the constitutional provision giving Congress the power to make rules and regulations for the government of the land and naval forces.

"The power of the executive to establish rules and regulations for the government of the army, is undoubted. . . . The power to establish implies, necessarily, the power to modify or repeal, or to create anew. . . . Such regulations cannot be questioned or defied, because they may be thought unwise or mistaken."<sup>21</sup>

Judicial approval of the power of Congress to authorize other departments of the government to promulgate administrative rules was clearly expressed in 1825 in a case involving a provision in the Judiciary Act of 1789 authorizing the United States courts to modify rules of practice.<sup>22</sup> Chief Justice Marshall in the opinion in this case, stated:

"It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . .

"The line has not been exactly drawn which separates these important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

"The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."

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<sup>21</sup> *United States v. Eliason*, 16 Pet. (U. S.) 291 (1842). See also *United States v. Freeman*, 3 How. (U. S.) 556 (1845); *Gratiot v. United States*, 4 How. (U. S.) 80 (1846); *Kurtz v. Moffitt*, 115 U. S. 487 (1885); *Swaim v. United States*, 165 U. S. 553 (1897).

<sup>22</sup> *Wayman v. Southard*, 10 Wheat (U. S.) 1, 42-46 (1825).

One of the most notable instances of administrative authority expressly provided by Congress and upheld by the courts, was the reciprocity clause in the tariff act of 1890, which practically made the imposition of tariff duties, under certain circumstances, dependent on presidential action. In the case of *Field v. Clark* the validity of this provision was discussed at length, with reference to previous cases of somewhat similar provisions; and the power was upheld, though with a dissenting opinion by two judges.<sup>23</sup>

Among other cases upholding a broad grant of discretionary power to administrative officers in applying acts of Congress, the following may be cited: *United States v. Ju Toy*, sustained a provision in the Chinese Exclusion Act giving the head of an executive department conclusive authority to decide as to the admission or exclusion of Chinese, even as against one claiming to be a native born citizen of the United States. *Union Bridge Co. v. United States* and *Monongahela Bridge Co. v. United States*, upholding a provision in section 18 of the River and Harbor Act of 1899 authorizing the Secretary of War to determine what are obstructions to navigation in navigable streams. And *Oceanic Navigation Co. v. Stranahan* holding valid a provision in the Alien Immigration Act of 1903 authorizing the Secretary of Commerce and Labor to impose a penalty on a transportation company bringing to the United States an alien immigrant afflicted with a loathsome contagious disease.<sup>24</sup>

Bearing more directly on the power to issue administrative regulations applying a general rule to a class of cases, as distinguished from administrative discretion in applying the law to a particular case, is the decision in *Buttfield v. Stranahan*.<sup>25</sup> This case dealt with the validity of a provision in section 2 of the Act of March 2, 1897 (to prevent importation of impure and unwholesome tea) that the Secretary of the Treasury, upon the recommendation of a board of tea experts, "shall fix and establish uniform standards of purity, quality and fitness for consumption for all kinds of teas imported into the United States." Under this act standards had been named in Treasury regulations.

<sup>23</sup> *Field v. Clark*, 143 U. S. 649 (1892).

<sup>24</sup> *United States v. Ju Toy*, 198 U. S. 253 (1905); *Union Bridge Co. v. United States*, 204 U. S. 364 (1907); *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 192-3 (1910); *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 339 (1909).

<sup>25</sup> *Buttfield v. Stranahan*, 192 U. S. 470, 496 (1904). See also *American Sugar Refining Co. v. United States*, 211 U. S. 155 (1908), which held that the Act of Congress of July 24, 1897, is not invalid in authorizing the Secretary of the Treasury to issue regulations governing the sampling and classification of imported sugar.

In the opinion in this case, Justice White stated:

"We may say of the legislation in this case, as was said of the legislation considered in *Field v. Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

The authority to issue administrative regulations was again confirmed, and a broader scope for such regulations was recognized, in the case of *United States v. Grimaud*.<sup>26</sup> This dealt with a provision in the Forest Reserve Act authorizing the Secretary of Agriculture to make rules and regulations, and making a violation thereof a penal offence.

In the opinion, by Justice Lamar, it was held:

"In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances and regulations for the government of towns and cities.

"It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 42, where he was considering the authority of courts to make rules. . . . .

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<sup>26</sup> *United States v. Grimaud*, 220 U. S. 506, 514, 516-17, 521 (1911). So, too, it has been held that the Act of Congress (Feb. 2, 1903), authorizing the Secretary of Agriculture to establish rules and regulations concerning the transportation of live stock in interstate commerce and to prevent the introduction or dissemination of contagion of any communicable disease of animals from foreign countries or from one state to another is valid. *United States v. Pennsylvania Co.*, 235 Fed. 961 (1916).

"From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress as measured by the injury done.

"That 'Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution,' *Field v. Clark*, 143 U. S. 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offence."

Similar rulings have been made in a number of cases involving the powers of the Interstate Commerce Commission. In *St. Louis and Iron Mountain Railway v. Taylor*,<sup>27</sup> it was held that the provision of section 5 of the Safety Appliance Act of March 2, 1893<sup>28</sup> providing that the standard height and maximum variation of draw-bars for freight cars should be designated by the American Railway Association and declared by the Interstate Commerce Commission was not unconstitutional as a delegation of legislative power.<sup>29</sup>

In two cases, decided in 1911 and 1913, the Supreme Court has upheld the provisions of the Interstate Commerce Act of June 20, 1906<sup>30</sup> authorizing the Interstate Commerce Commission to prescribe the manner of keeping railroad accounts. In the opinion in the case of *Interstate Commerce Commission v. Goodrich Transit Co.* Justice Pitney stated:

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules

<sup>27</sup> *St. L. & I. M. Ry. v. Taylor*, 210 U. S. 281, 287 (1908).

<sup>28</sup> 27 STAT. AT L., 531.

<sup>29</sup> *St. L. & I. M. Ry. v. Taylor*, 210 U. S. 281, 287 (1908).

<sup>30</sup> 34 STAT. AT L., 584, C. 3591.

to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rule laid down by Congress."<sup>31</sup>

In *Kansas City St. Ry. v. United States* Justice Pitney said:

"There is here no unconstitutional delegation of legislative powers. . . . And since, as just shown, uniformity in accounting is dependent upon the adoption and enforcement of precise classification, the authority to define the terms of the classification necessarily follows. It amounts, after all, to no more than laying down the general rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations."<sup>32</sup>

In the *Intermountain Rate Cases* the long and short haul provisions of Section 4 of the Interstate Commerce Act as amended by Act of June 18, 1910, were held not to be repugnant to the Constitution of the United States as a delegation of power to the Interstate Commerce Commission beyond the competency of Congress.<sup>33</sup>

More recently, in the case of *Brushaber v. Union Pacific R. R.* Chief Justice White held that the authority to confer on executive officers administrative powers to enforce an act was so clearly established as to be no longer in need of argument.

"We have not referred to a contention that because certain administrative powers to enforce the [income tax] act were conferred by statute upon the Secretary of the Treasury, therefore it was void as unwarrantedly delegating legislative authority, because we think to state the proposition is to answer it."<sup>34</sup>

Similarly it has been held that the provisions of the Federal Reserve Act authorizing the Federal Reserve Board to make rules and regulations are not invalid as an unconstitutional delegation of legislative power.<sup>35</sup>

Still more recently it has been held that the provisions of the Selective Service Act of 1917 authorizing executive regulations are not invalid as vesting administrative officers with legislative dis-

<sup>31</sup> *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 214 (1912).

<sup>32</sup> *Kansas City So. Ry. v. United States*, 231 U. S. 423, 443 (1913).

<sup>33</sup> *Intermountain Rate Cases*, 234 U. S. 476 (1914).

<sup>34</sup> *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 8, 26 (1916).

<sup>35</sup> *First Nat. Bank v. Fellows*, 244 U. S. 416 (1917).

cretion; and the courts have taken judicial notice of the regulations issued under this act.<sup>36</sup>

The power to make executive rules to interpret statutes and to aid in the administration of laws, even when not expressly authorized, appears also to be clearly established by long practice.

At the same time the power to issue administrative regulations is not unlimited; and certain restrictions have been laid down by the courts. An executive regulation not authorized may be declared void; and a regulation interpreting a statutory provision may be overruled as erroneous.<sup>37</sup> The power conferred to make regulations for carrying a statute into effect must be exercised within the powers authorized, that is it must be confined to provisions for regulating the mode of proceeding to carry into effect the law as it has been enacted; and it cannot be extended to amending or adding to the requirements of the statutes nor to subverting the statute. Thus, when the Interstate Commerce Commission, under a provision in the original act of 1887 to prevent discriminating and unreasonable railroad rates, undertook to fix a schedule of maximum reasonable rates it was held that this was exercising a legislative power which had not at the time been clearly conferred on the commission.<sup>38</sup> When this authority was expressly named by Congress, it was accepted by the courts.

Even regulations issued under the constitutional authority of the President as commander in chief of the army and navy, must not conflict with statutory provisions.

"The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others."<sup>39</sup>

So, too, it has been held that a provision in the timber and stone act, that "effect shall be given to the foregoing provisions of the act by regulations to be prescribed by the Commissioner of the General

<sup>36</sup> Selective Draft Cases: *Arver v. United States*, 245 U. S. 366 (1918); *Frank v. Murray*, 248 Fed. 865 (1918); *United States v. Casey*, 247 Fed. 362 (1918); *United States v. Scott*, 248 Fed. 361 (1918); *United States v. Miller*, 249 Fed. 985 (1918).

<sup>37</sup> 2 Cranch. (U. S.) 170 (1804); 5 Blatchf. (U. S.) 63 (1862); 107 U. S. 470 (1882).

<sup>38</sup> 167 U. S. 479 (1897).

<sup>39</sup> HARLAN, J. in *United States v. Symonds*, 120 U. S. 46, 49 (1887).

Land Office," "must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."<sup>40</sup>

But it will be presumed that regulations adopted were to carry out the provisions of the statute, and not to embrace matters not covered, nor intended to be covered thereby.<sup>41</sup>

Another question which has arisen is as to whether and how far executive regulations are rules of law which will be enforced by the courts. In most cases such regulations can be effectively enforced by means of the control of the President and other higher officials over the personnel of the administrative services.

To a large degree they are also recognized by the judiciary; but there are some limitations as to the use of judicial processes for their enforcement. The Supreme Court has held that executive regulations made in pursuance of express authority of Congress "become a mass of that body of public laws of which the courts take judicial notice;"<sup>42</sup> and that regulations issued in accordance with congressional authority have the full force of a statute upon private individuals as well as upon public officials.<sup>43</sup>

At the same time it has also been declared that: "Regulations prescribed by the President and by the heads of the departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing so required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."<sup>44</sup>

"Congress cannot delegate its legislative power so as to authorize an administrative officer, by the adoption of regulations, to create an offense and prescribe its punishment, but this statute [Act of June 4, 1888] proclaims a punish-

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<sup>40</sup> WHITE, J., in *Williamson v. United States*, 207 U. S. 425, 462 (1908), as to regulation requiring a statement at final hearing in addition to preliminary sworn statement required by the act as to the *bona fides* of application and the absence of any contract or agreement as to the title.

<sup>41</sup> 12 CORPUS JURIS, 845.

<sup>42</sup> *Caha v. United States*, 152 U. S. 211 (1894).

<sup>43</sup> REV. STAT., Ser. 251; 1 Abbott, (U. S.) 351 (1809); 4 How. (U. S.) 80 (1846); 100 U. S. 13, 23 (1879).

<sup>44</sup> *United States v. Eaton*, 144 U. S. 677, 688 (1892).

ment for the offense which in general terms is defined by law, the regulation dealing only with the matter of detail and administration necessary to carry into effect the object of the law."<sup>45</sup>

"A crime may only be created, by a public act, the language of which act is sufficient in itself to completely declare and define the crime and fix its punishment. Congress having no power to delegate to the President or to the head of any executive department authority to declare what facts shall constitute an offense, though it is competent for Congress to commit to the executive the power to determine when the occasion provided by the law itself for its going into effect has occurred, and whether the facts which the law makes conditions to its operation or to a partial or temporary suspension of its operation exist, and also to provide the details of the law's administration."<sup>46</sup>

"Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be inferred from legislative authority to enforce it.

"And a regulation of such an officer or department, made under legislative authority to make rules to enforce an act of Congress which has the effect to subject classes of property to forfeiture, and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the statute, is unauthorized and void. . . . The definition of offenses, the classification of offenders, and the prescription of the punishment they shall suffer, are legislative and not executive functions, and neither forfeitures, fines nor penalties may be prescribed, imposed, or inflicted therefor either by executive officers, or by courts."<sup>47</sup>

#### PREPARATION AND PUBLICATION.

Notwithstanding the variety and volume of administrative regulations, and their importance in the work of the government, comparatively little attention has thus far been given to the methods of their preparation and publication. This is perhaps due in part to the fact that very few, if any, even of the government officials

<sup>45</sup> 22 Op. Atty. Gen. 266 (1898.)

<sup>46</sup> United States v. Louisville, etc., R. Co. 176 Fed. 942 (1910.)

<sup>47</sup> United States v. 11,150 Pounds of Butter, 195 Fed. 657, 658 (1912.)

As to injunctions to enforce civil service rules, Cf. FAIRLIE: NATIONAL ADMINISTRATION OF THE UNITED STATES, p. 27.

have any adequate appreciation of the scope and significance of such regulations in the governmental service as a whole. There has been a good deal of discussion of the need for improvement in legislative drafting; yet legislative bills receive a good deal more careful consideration than most administrative regulations. In the matter of publication, acts of Congress and state legislatures are promulgated in well known and accessible ways; but it is a difficult and almost impossible task to keep track of the multifold variety of administrative regulations.

In the case of the highest class of such regulations—the proclamations and executive orders of the President—there appears to be no definite agency charged with their preparation. Drafts for proposed measures of this kind seem to be prepared in the departments specially concerned with the subject matter; and after receiving the approval of the President, they are issued by the Department of State in separate leaflets, countersigned by the Secretary of State. Proclamations are afterwards reprinted in the volumes of congressional statutes and treaties; but there is no official publication of the series of executive orders except in the original detached leaflets. During the war a good many proclamations and executive orders were reprinted, along with other administrative regulations, in the "OFFICIAL BULLETIN"; but this was by no means complete, and there is as yet no provision for continuing even this form of publication as a permanent arrangement.

Nor is there any general system for the preparation and publication of regulations issued by departments, bureaus, commissions and other agencies. These are issued in the name of the head of the department or other government agency; but in very few cases can they receive his personal attention, and even if personally signed by him, the actual work of drafting the regulation has been done by others. Moreover the drafting of such regulations is no less, and in some respects it is more technical and difficult than the drafting of legislative measures. To insure their validity, it is necessary, not only to keep within the limits of constitutional provisions and their judicial interpretation, but also to follow the boundaries of jurisdiction defined by many complicated statutory provisions, and, in the case of regulations issued by bureaus and inferior offices, to comply and avoid conflicts with the regulations of higher administrative authorities. In addition there is often the task of reconciling conflicting views within the department or bureau; and finally the desirability of expressing the intention in clear and unambiguous language. To meet these requirements calls for not only a good general and legal training, but also a highly specialized

knowledge of the laws, regulations and functions of the particular service, which can only be secured by continuous service.

In some of the government services agencies have been established for the preparation of administrative regulations:

In the war department, there is a legislative and regulations branch in one division of the general staff; and also an orders and regulations section in the purchase, storage and traffic division, supervising the work of supplies and transportation. There is also an orders and regulations branch in the bureau of war risk insurance in the treasury department. Other agencies may be found in some other services. Most of the departments have a division of publications; but these have no responsibility for the preparation of regulations, and in many services there is no organized machinery for this work, and important regulations may be issued on the basis of memoranda prepared in haste and without careful study and consideration.

In the matter of publication there is a maximum of variety and confusion. Not only is there no general system, but no department has developed a system for itself. Each bureau, and often each local office, has its own methods, or more often lack of method. There are in some cases, considerable bodies of more or less permanent regulations, such as the consular regulations and the army regulations. Yet even these are subject to frequent change and amendment; and a serious problem for the subordinate official is to keep posted on the latest changes. But there are also more numerous volumes of rules, instructions, and orders, not part of the permanent regulations, often making what prove to be continuing changes from the provisions in the main body of regulations. Still further, special instructions may be issued in the form of mimeographed circulars, or circular letters, or even in telegrams sent to certain officials which may never be reissued in any of the regular series.

There is no approach to uniformity in nomenclature. Rules, Regulations, Instructions, General Orders, Orders, Circulars, Bulletins, Notices, Memoranda and other terms are given to different series of publications by different government offices, with no clear distinction as to the meaning of these terms. In some cases an attempt seems to be made to separate regulations which impose mandatory orders from circulars of information or advice; but even this distinction often breaks down in practice. Further difficulties arise from the frequency of changes and modifications; and here again there is no uniformity in the form and methods of issuing such amendments.

Subordinate officials may ordinarily be supposed to receive the

official publications from their own superiors bearing on their own work. Yet even here, there is sometimes a failure to prepare or to carry out an adequate system of distributing orders and regulations. In some cases the number and variety of instructions issued are more than can be taken care of by individual officers, especially in the absence of regular and frequent indices, digests and summaries. More difficult is the problem of one branch securing publications issued by another branch which may have an important bearing on its work.

For the citizen outside the government service, the problem of securing and keeping track of the administrative regulations which may affect his affairs is even more difficult. It is not easy to learn which of the government services are responsible for particular matters. One would not expect the Commissioner of Internal Revenue to issue regulations for the sale of narcotics, nor the Secretary of Agriculture to regulate importations of certain commodities. Large business enterprises need to keep in touch with many of the numerous government services, which may issue duplicating or even conflicting orders. There is also, sometimes, the difficulty of securing regular distribution for important regulations which affects subordinate officials.

These criticisms are not directed at the present administration. They represent conditions that have existed for a long time, and have been accentuated in recent years with the increasing mass of legislation and administrative regulations affecting others than government officials. They have been further emphasized by the great extension of government control and the enormous pressure of work in the government during the war. But the fundamental difficulties are of long standing; and even after some relaxation since the close of the war, the permanent difficulties demand attention.

There is need first, within each department and in the government service as a whole, for more systematic and uniform methods in the preparation and publication of administrative regulations. There should be in each department an agency for supervising the preparation and issue of all such regulations within the department. The number of classes of publications should be reduced, and a more uniform terminology established. Finally there should be an official publication which will record all regulations and instructions issued by all branches of the government service.

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